IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 164 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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BABUBHAI @ MADHABHAI DABHAIBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,
MR CHIRAG M PAWAR for Appellant(s) : 1,
MR KP RAVAL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 28/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.The present appeal has been filed by the

appellant-original accused of Sessions Case No.121 of 1998 being aggrieved and dissatisfied with the judgment and order dated 21-1-1999 delivered by the learned Sessions Judge, Panchmahal at Godhra in Sessions Case No.121 of 1998 whereby he has been convicted and sentenced for the offence under Sec.302 of IPC to suffer for life and to pay fine of Rs.200/-, in default, to suffer further three months RI. He has been however acquitted for the offence under Sec.504 of IPC and Sec.135 of Bombay Police Act.

2. The short facts of the case of the prosecution is that on 2-1-1998 at about 6.00 a.m. when the deceased was sleeping in his house, one person gave blow on his head with axe causing severe multiple head injuries due to which, his brain has come out. His wife, who was also sleeping in the same room, saw the appellant running away from the house along with axe and, therefore, immediately, she cried for help. Neighbours and relatives gathered there and found that the deceased had succumbed to the injuries. Therefore, she went to the house of Sarpanch and thereafter, to Halol Police Station accompanied by the Sarpanch and complaint has been lodged against the present appellant. The said complaint has been registered as Halol Police

Station C.R.No.1 of 1998 for the offences punishable under Secs.302-504 of Indian Penal Code and Sec.135 of Bombay Police Act. After registration of the offence, PSO gave yadi along with the complaint to I.O. to investigate into the matter. In pursuance of which, I.O. has taken over investigation and went to place of incident. He called panchas, prepared inquest panchnama, thereafter filled up the Marnotar Form and made arrangements to send the dead body of the deceased for post mortem. Thereafter, he prepared panchnama of scene of offence and also seized muddamal from the scene of offence after following required procedures. Meanwhile, accused appeared before him and, therefore, he was arrested after following legal formalities. Thereafter, the accused expressed his willingness to produce the muddamal alleged to have been used in the commission of offence. He therefore called the panchas and prepared primary panchnama and went in police jeep along with panchas, police personnel and accused. Thereafter, the accused asked to stop the vehicle at a place and he took out the axe from babul tree and handed over the same to police and, therefore, he completed the second part of the panchnama there itself. He sent all the muddamal to FSL for analysis and on receiving the FSL report and

post mortem note, same were kept in investigation file. Upon completion of investigation, he submitted the charge sheet against the accused in the Court of learned Judicial Magistrate (First Class), Halol.

3. The case being exclusively triable by the Court of Sessions, the learned Judicial Magistrate (First Class), Halol, committed the case to the Court of Sessions, Panchmahals at Godhra by sending the case papers including the charge sheet where it was numbered as Sessions Case No.121 of 1998. On production of the accused, the learned Sessions Judge framed charge against the accused. The accused has pleaded guilty to the charge framed against him. The learned Judge therefore noted down the same and thereafter passed an order directing the prosecution to prove the guilt against the accused.

4. To prove the guilt against the accused, the prosecution examined in all six witnesses namely, Shantaben Mohanbhai, P.W.1, Ex.8, who is the wife of the victim; Lakhiben Mohanbhai, P.W.2, Ex.30, who is the daughter of the victim; Bagubhai Somabhai, P.W.3, Ex.31, a panch; Fatesinh @ Ramanbhai Chandrasinh, P.W.4, Ex.33, who is the Sarpanch of Sathrota Village; Dr.Bhagvatsinh Punamchand Itare, P.W.5, Ex.34, the doctor

who performed post mortem on the dead body of the deceased and Raghunathsinh Motisinh Rathod, P.W.6, Ex.35, who recorded the complaint of the complainant Shantaben. The prosecution also produced and placed reliance on documentary evidence.

5. On submission of closing pursis by the learned APP, the learned Sessions Judge recorded further statement of the accused under Section 313 of Code of Criminal Procedure wherein in answer to question No.5, he has categorically admitted that he has given blow with reverse side of the axe on the head of his brother. To the previous question as to whether he had any dispute about the agricultural land with his brother, he has replied in affirmative. To the question regarding the discovery panchnama, he has categorically replied that he has produced the same upon expressing his willingness. Even question has been asked as to the oral evidence of Shantaben and Lakhiben, who are wife and daughter of the victim to which, he has replied that whatever they have deposed before the Court is true. Thus, while recording the further statement, the accused has admitted his guilt. Thereafter, learned Sessions Judge on affording opportunities of hearing to the learned advocates for the respective parties

has convicted the accused for the offence under Sec.302 of IPC and sentenced to suffer for life and to pay fine of Rs.200/-, in default, to suffer for three months RI, which has given rise to the present appeal.

6. Heard learned counsel for the appellant, Mr.Chirag M.Pawar and learned Additional Public Prosecutor, Mr.K.P.Raval for the State. We have also gone through the admission part of the appellant accused before trial and after the trial while recording his further statement under Sec.313 wherein he has categorically admitted the offence in toto.

7. It is required to be noted that at the time of framing of charge, he has admitted his guilt. Thereafter, learned Sessions Judge has investigated into the matter and order to that effect has been passed upon Ex.1 directing the prosecution to prove the guilt against the accused.

8. In the background of the aforesaid facts, learned counsel for the appellant, Mr.Pawar has mainly argued after showing us the oral evidence of wife of the victim, Shantaben that she is the only eye witness to the incident. He has submitted that even at the time of incident, the appellant was mentally ill and his treatment is going on till date and hence, it is prayed that mercy be shown

towards the appellant. It is also submitted that the appellant has already undergone more than 9 years and 9 months of imprisonment.

9. Learned APP has produced the jail report dated 27-9-2007 along with the report of Dr.V.K.Modi, Medical Officer, Jail Dispensary, Central Jail Prison, Baroda, dated 27-9-2007. The said reports are taken on record. The report of Medical Officer reads as under:

"Sub: Regarding the latest medical opinion of C.P.No.-77006 Babubhai Madhabhai.

Ref: Letter of the Dy.Superintendent, Vadodara Central Prison dated 27/9/2007

Sir,

With reference to the above subject C.P.No.-77006 Babubhai Madhabhai is taking treatment from Jail Dispensary as well as S.S.G.Hospital, Vadodara for his ailment.

For his complain of mental illness in past on 25/05/06 patient has been admitted in Psychieatry Department for confirmation of his illness. The report shows there is no evidence of any psychieatry illness. The patient send to clinical psychologist for psychosomatic assessment at mental Hospital Vadodara on 30/05/06.

After coming back from mental Hospital Vadodara patient is regularly taking treatment from psychiaetry department S.S.G.Hospital for his Psychomatic illness. Latest this patient is examine by psychiatrist on 19/09/07 and given followup treatment. At present patient is stable. This patient is taking regular followup treatment from central jail dispensary and psychiatric department S.S.G.Hospital.

Thanking you,

Yours faithfully,

Sd/-
(Dr.V.K.Modi)
Medical Officer,
Jail Dispensary”

The jail report shows that the appellant has already undergone more than 9 years and 10 months of imprisonment. Jail record also shows that though he has undergone about 10 years of imprisonment, he could not come out from jail for a single day in view of the fact that the furlough granted to him could not be utilised as he was not able to provide high surety. Thus, the appellant has not seen the world since last 10 years of his imprisonment even though he is mentally ill and his treatment is going on.

10. It may be noted that time and again we have passed orders directing the jail authorities to do needful in cases where the prisoners were not able to come out from jail in view of heavy surety being asked to provide while granting furlough leave thereby indirectly taking away the valuable rights provided by the Act to the prisoners. The jail authorities should also keep in mind the fact that we are passing orders to release the prisoners on temporary bail on personal surety of Rs.5,000/- to be executed before

the Jail Authorities.

11. Under the circumstances, the jail authorities may not impose heavy surety amount while granting furlough leave and should pass such orders which can ultimately be complied with by the parties so that the very purpose of granting furlough leave would not be defeated. The jail authorities may also take some reasonable risk looking to the peculiar facts and circumstances of the case.

12. Here in this case, it is true that there is sufficient evidence to connect the accused with the crime in question in the form of evidence of eye witness i.e. wife of the deceased Shantaben. The incident in question admittedly has taken place early in the morning at 6.30 in the room where the deceased and his wife were sleeping when the appellant went into the room and gave blow with the reverse side of the axe on the head of the deceased due to which, the deceased received multiple fractures on skull and his brain has come out. When wife of the deceased got up on hearing the incident, she has seen the appellant running away from the scene of offence with axe. She has identified the said assailant as the appellant in Court also. Thus, the incident in question has been proved beyond reasonable doubt by the prosecution through the evidence of the

complainant.

13. It is required to be noted that the deceased and the appellant are real brothers and are neighbours. It is also established that there was a dispute between the two brothers regarding the agricultural land. Therefore, there is no question of misidentification of the accused. Over and above, presence of Shantaben, wife of the appellant, at the time of incident is also proved by the prosecution beyond reasonable doubt. Looking to the way in which the incident has taken place in the room of the appellant in the early morning, one can presume that Shantaben being the wife of the victim would be there in her matrimonial house. Once it is established that she was present at the place of incident, question of misidentification of the appellant by her may not be arisen at all and hence, if she has stuck to her version before the Court that she has seen the appellant running away from the place of incident along with axe and nothing contrary came out in her cross examination, her evidence should be believed by the Court and has been rightly believed by the court below.

14. As far as the evidence of daughter-Lakhiben of the victim is concerned, it is required to be noted that she is not the witness of incident. She is staying in the same house

and hence, she came to the scene of incident immediately after hearing the shout for help from her mother. Therefore, her evidence supporting the say of her mother is a corroborative piece of evidence.

15. Apart from the above, there is also the evidence of panchnama under Sec.27 of the Indian Evidence Act wherein the appellant has willingly produced the axe alleged to have been used in the commission of offence and said panchnama has been proved by the prosecution. Not only that, even FSL report also support the say of the prosecution. Over and above, as stated above, the appellant in his further statement has admitted the offence in toto and thereafter, the conviction of the appellant has been taken place.

16. It is true that the impugned judgment delivered by the court below does not appear to be satisfactory at all but we are not entering into the same. However, when we see the judgment delivered by a Senior District Judge and that too also in this form, we feel sorry for the same.

17. Though the the offence against the appellant has been proved by the prosecution beyond reasonable doubt, facts however remain that the present appellant has already undergone more than 10 years of imprisonment. Jail

report as well as the report of the doctor at the Jail Dispensary show that the appellant is suffering from mental illness. Jail record also indicates that the appellant could not come out from jail even for a single day.

18. Under the circumstances, keeping in mind the illness of the appellant and the present condition as well as the fact that he could not come out from jail even for a single day during these 10 years of imprisonment, we feel that the sentence imposed upon the appellant by the court below is required to be reduced and the ends of justice would be met if sentence already undergone by the appellant in jail is treated as the sufficient punishment.

19. Thus, this appeal is partly allowed. Judgment and order of conviction and sentence dated 21-1-1999 delivered by the learned Sessions Judge, Panchmahal at Godhra in Sessions Case No.121 of 1998 is modified and the sentence already undergone by the appellant-accused-Babubhai @ Madhabhai Dabhaibhai is ordered to be treated as the sufficient sentence. The appellant is therefore ordered to be set at liberty forthwith, if not required in any other offence.

(R.P.DHOLAKIA,J.)

(K.S.JHAVERI,J.)

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